



# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 453.

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THE MUTUAL LIFE INSURANCE COMPANY OF NEW  
YORK, PETITIONER,

*vs.*

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C.  
HILL, BY THEIR GUARDIAN, EBEN SMITH, AND ELIZA  
MAUDE HILL, IN HER OWN BEHALF.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE NINTH CIRCUIT.

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PETITION FOR CERTIORARI FILED NOVEMBER 20, 1899.  
CERTIORARI AND RETURN FILED MAR 10 1900

(17,567.)



(17,567.)

SUPREME COURT OF THE UNITED STATES.

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YORK, PETITIONER,

728

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1 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Plaintiff in Error,	} No. —.
<i>vs.</i>	
GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL, by Their Guardian, Eben Smith, and Eliza Maude Hill, in Her Own Behalf, Defendants in Error.	

*Order Enlarging Time to File Clerk's Return and Docket Cause.*

Now, on this fifteenth day of February, 1899, upon the application of Messrs. Struve, Allen, Hughes & McMicken, attorneys for plaintiff in error above named, and good and sufficient cause being shown and appearing therefor, it is ordered by the court that the time within which the clerk of the circuit court of the United States for the district of Washington shall make, transmit to, and file with the clerk of the United States circuit court of appeals for the ninth circuit, his return of the writ of error and copy of the record in the above entitled cause be, and the same is hereby, extended thirty days from the return day of said writ of error and the citation herein, to wit, thirty days from the twenty-first day of February, 1899, and that the time within which said plaintiff in error

2 shall docket said cause and file the record thereof with the clerk of said circuit court of appeals be and the same is hereby extended for the time above named.

C. H. HANFORD,

*United States District Judge for the District of Washington,  
Sitting as Judge of said Circuit Court of the United States,  
and the Judge Who Allowed said Writ of Error and  
Signed said Citation.*

(Endorsed:) Original. No. 518. In the United States circuit court of appeals for the ninth circuit. The Mutual Life Insurance Co. of New York, plaintiff in error, *vs.* George E. Hill *et al.*, defendants in error. Order enlarging time to file clerk's return and docket cause. Filed February 20, 1899. F. D. Monckton, clerk. Struve, Allen, Hughes & McMicken, for plaintiff in error, 520 Bailey building, Seattle, Wash.

In the Circuit Court of the United States, District of Washington,  
Northern Division.

<p>GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. Hill, by Their Guardian, Eben Smith, and Eliza Maud Hill, in Her Own Behalf, Plaintiffs,</p> <p style="text-align: center;"><i>vs.</i></p> <p>THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.</p>	}	No. 511.
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3

*Amended Complaint.*

Come now the above-named plaintiffs, by their attorneys, and for a cause of action against the above-named defendant complain and allege:

First.

That the above-named plaintiffs, George E. Hill, Ellen Kellogg Hill, and Eugene C. Hill are each of them under the age of twenty-one years.

Second.

That on the seventh day of April, 1888, at Seattle, Territory of Washington, now State of Washington, the above-named Eben Smith was duly appointed by the district court of the then Territory of Washington, now State of Washington, district guardian of the property and person of George E. Hill, Ellen Kellogg Hill, and Eugene C. Hill, and thereupon said Eben Smith qualified as such guardian, and he has ever since been, and now is, the duly appointed, qualified, and acting guardian of the property and persons of George E. Hill, Ellen Kellogg Hill and Eugene C. Hill.

Third.

That said George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, Eliza Maude Hill, and Eben Smith are each and all of them, and during all the times herein have been, residents, citizens and inhabitants of the State of Washington.

Fourth.

4 That the defendant, The Mutual Life Insurance Company is a corporation duly organized, acting and existing *and* under and by virtue of the laws of the State of New York, with its principal office and place of business in the city of New York, State of New York.

Fifth.

That on or about the twenty-ninth day of April, 1886, said defendant, in consideration of the sum of eight hundred and fourteen dollars (\$814) to it in hand paid by one George Dana Hill, made, executed and delivered in the city of New York, State of New York, a certain contract or policy of insurance hereinafter set forth,

whereby it insured the life of said George Dana Hill in the sum of twenty thousand dollars (\$20,000). That said defendant in said contract agreed to pay Ellen Kellogg Hill, if living, and if not living then to such of the children of their bodies (the bodies of said George D. and Ellen Kellogg Hill) as shall be living at the death of said Ellen Kellogg Hill, or their guardian for their use, upon acceptance of satisfactory proof, of the death of said George Dana Hill, the full sum of twenty thousand dollars (\$20,000). That said contract or policy of insurance is in words and figures as follows, to wit:

No. 281,470. A.

The Mutual Life Insurance Company of New York.

Age, 46 years.

Amount, \$20,000.

In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay at its home office in the city of New York, unto Ellen Kellogg Hill, wife of George Dana Hill of Seattle, in the county of King, Washington Territory, for her sole  
5 use, if living, in conformity with the statute, and if not living, to such of the children of their bodies as shall be living at the death of the said wife or to their guardian, for their use, twenty thousand dollars (\$20,000) upon acceptance of satisfactory proofs at its said office, of the death of the said George Dana Hill during the continuance of this policy, upon the following condition, and subject to the provisions, requirements, and benefits stated on the back of this policy which are hereby referred to and made part hereof.

The annual premium of eight hundred and fourteen dollars (\$814.00) shall be paid in advance on the delivery of this policy, and thereafter to the company, at its home office in the city of New York, on the twenty-ninth day of April in every year during the continuance of this contract.

In witness whereof the said The Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary, at its office in the city of New York the twenty-ninth day of April, A. D. one thousand eight hundred and eighty-six.

RICHARD A. McCURDY, *President.*

W. J. EASTON, *Secretary.*

*Provisions, Requirements, and Benefits.*

Payment of premiums.—Each premium is due and payable at the home office of the company in the city of New York, but will be accepted elsewhere when duly made in exchange for the  
6 company's receipt, signed by the president or secretary.

Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of



this contract shall be deducted from the amount of the claim. If this policy shall become void for non-payment of premium, all payments previously made shall be forfeited to the company except as hereinafter provided.

**Dividends**—This policy is issued on the five-year distribution plan. It will be credited with its distributive share of surplus apportioned at the expiration of each five years from the date of issue. Only policies in force at the end of such terms, and entitled thereto by year of issue, shall share in such distribution of the surplus; and no other distribution to such policies shall be made at any other time. All surplus so apportioned may be applied at the end of such periods to purchase additional insurance, or in payment of future premiums on this policy, if requested in writing, or may then be drawn in cash.

**Paid-up policy.**—After three full annual premiums have been paid upon this policy, the company will, upon the legal surrender thereof before default in payment of any premium, or within six months thereafter, issue a paid-up policy, payable as herein provided, for the amount required by the provisions of the act of May 21, 1879, chap. 347, Laws of the State of New York.

7 **Surrender.**—This policy may be surrendered to the company at the end of the fifth year from the date of issue, and eighty per cent. of the reserve computed by the American table of mortality and four and one-half per cent. interest, and the surplus as defined above, will be paid therefor. If surrendered at the end of the second, or of any subsequent five-year period, the full reserve by the same standard and the surplus as defined will be paid. No cash value will be paid for a surrender at any other time or date.

**Notice.**—Powers of agents.—No agent has power on behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to bind the company by making any promise or by receiving any representation or information not contained in the application for this policy.

**Assignments.**—The company declines to notice any assignment of this policy until the original or a duplicate or certified copy thereof shall be filed in the company's home office. The company will not assume any responsibility for the validity of an assignment.

That the first annual premium of eight hundred and fourteen dollars (\$814) was paid to said defendant company on the delivery thereof to said George Dana Hill, by said George Dana Hill.

Sixth.

That the application referred to is not in the hands of plaintiffs, but is in the hands and possession of defendant and plaintiffs cannot set forth a copy thereof, but plaintiffs allege that said

8 application contained the following agreement and words:

"And it is agreed that there shall be no contract of insurance until a policy shall have been delivered and issued by said company

and the first premium thereon paid while the person proposed for insurance is in the same condition of health described in this application; and that if said policy be issued the declarations, agreements and warranties herein contained shall be a part thereof; and the contract of insurance when made shall be held and construed at all times and places to have been made in the city of New York."

Seventh.

Said Ellen Kellogg Hill mentioned in said contract above set forth, died February 14, 1887, in the city of Seattle, Territory of Washington, now State of Washington. Said Ellen Kellogg Hill died prior to said George Dana Hill.

Eighth.

Said George Dana Hill, insured, died on the fourth day of December, 1890.

Ninth.

Said Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill and Eugene C. Hill were children of the bodies of said Ellen Kellogg Hill and George Dana Hill, and were living at the time of the death of said Ellen Kellogg Hill.

Tenth.

Said Eliza Maud Hill, George E. Hill, Ellen Kellogg Hill and Eugene C. Hill were the only children of the bodies of said Ellen Kellogg Hill and George Dana Hill at the time of the death of said Ellen Kellogg Hill.

9

Eleventh.

That on the twenty-third day of December, 1890, the defendant was notified of the death of said George Dana Hill, and requested to furnish plaintiffs necessary blanks in order that plaintiffs might furnish proofs of death as required by the rules and regulations of defendant company.

Twelfth.

That on the third day of February, 1891, said defendant in reply thereto informed and declared to said plaintiffs that said contract or policy of insurance above set forth had been forfeited by the non-payment of a premium.

That said defendant thereby waived the right to claim any other or any proofs of the death of said George Dana Hill.

Thirteenth.

That said George Dana Hill during his lifetime duly performed all the conditions of said contract necessary by him to be performed.

## Fourteenth.

That the defendant has wholly failed to pay to plaintiffs said policy of insurance or said sum of twenty thousand dollars (\$20,000), or any part thereof.

Wherefore plaintiffs pray for judgment against said defendant in the sum of twenty thousand dollars (\$20,000), with interest thereon at the rate of six per cent. per annum, from the third day of January, 1891, together with cost and disbursements in this action.

SMITH & LITTELL,  
STANTON WARBURTON,  
*Attorneys for Plaintiffs.*

10 STATE OF WASHINGTON, )  
County of King, } ss :

Eben Smith, being first duly sworn on oath, deposes and says : that he is the Eben Smith above named as one of the plaintiffs in the above entitled action ; that he has read the foregoing complaint, and knows the contents thereof, and that he believes the same to be true.

EBEN SMITH.

Subscribed and sworn to before me this nineteenth day of October, 1895.

[SEAL.]

THOMAS T. LITTELL,  
*Notary Public, Residing at Seattle,*  
*King County, State of Washington.*

(Endorsed :) Amended complaint. Filed Oct. 19, 1895, in the United States circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

United States Circuit Court for the District of Washington.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. Hill, by Their Guardian, Eben Smith, and Eliza Maud Hill, in Her Own Behalf, Plaintiffs,	} No. 511.
vs.	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.	

11 *Præcipe for Appearance of Attorneys for Plaintiffs.*

To the clerk of above-entitled court :

You will please enter our appearance as attorneys for above-named plaintiffs in the above-entitled cause.

Dated Oct. 19, 1895.

SMITH & LITTELL,  
STANTON WARBURTON,  
*Attorneys for Plaintiffs.*

(Endorsed :) Præcipe for appearance. Filed Oct. 19, 1895. A. Reeves Ayres, clerk. R. M. Hopkins, deputy clerk.

In the Circuit Court of the United States, District of Washington,  
Northern Division.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. }  
Hill, by Their Guardian, Eben Smith, and Eliza Maude }  
Hill, in Her Own Behalf, Plaintiffs, } No. 511.  
vs. }  
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK. }

*Præcipe for Appearance of Attorneys for Defendant.*

To the clerk of the above-entitled court :

Please enter our appearance for the Mutual Life Insurance Company of New York, specially for the purpose of objecting to the jurisdiction and power in said court to compel said corporation, The Mutual Life Insurance Company of New York, named as defendant herein, to appear or answer in the above cause; and of objecting to the return of the marshal upon the summons issued in said cause, and for no other purpose. At the same time we file this præcipe, we file a motion to set aside and quash said return, and to dismiss the said action for want of jurisdiction in this court.

STRUDWICK & PETERS,  
*Attorneys for the Mutual Life Insurance  
Company of New York.*

(Endorsed :) Appearance præcipe. Filed Nov. 13, 1895, in the United States circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

In the Circuit Court of the United States, District of Washington,  
Northern Division.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. }  
Hill, by Their Guardian, Eben Smith, and Eliza Maude }  
Hill, in Her Own Behalf, Plaintiffs, } No. 511.  
vs. }  
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, }  
Defendant. }

*Stipulation.*

It is stipulated between the plaintiffs and defendant, the consent of the court being given thereto, that the said plaintiffs may amend their complaint and make such amendment by the substitution of the following matter, in lieu of the first page of said complaint as the same is now upon file, and that as so amended, such amended complaint stands as the amended complaint of plaintiffs in this cause. That the said defendant make answer to the same instant, and that plaintiffs immediately demur to the answer to said amended complaint, and that the court may rule upon said

demurrer upon the arguments heretofore made, without further argument on the part of the plaintiffs or defendant, and that said amended complaint, defendant's answer thereto, and plaintiffs' demurrer to said answer, constitute and are the pleadings in this cause.

Dated this eighteenth day of January, 1899.

S. WARBURTON, *Attorney for Plaintiffs.*

STRUVE, ALLEN, HUGHES & McMICKEN,

*Attorneys for Defendant.*

In the Circuit Court of the United States, District of Washington,  
Northern Division.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. Hill, by Their Guardian, Eben Smith, and Eliza Maud Hill, in Her Own Behalf, Plaintiffs,	} No. 511.
<i>vs.</i>	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.	

14

*Amended Complaint.*

Come now the above-named plaintiffs, by their attorneys, and for a cause of action against the above-named defendant, complain and allege:

*First.*

That the above-named plaintiffs, George E. Hill, Ellen Kellogg Hill and Eugene C. Hill are each of them under the age of twenty-one years.

*Second.*

That on the seventh day of April, 1888, at Seattle, Territory of Washington, now State of Washington, the above-named Eben Smith was duly appointed by the district court of the then Territory of Washington, now State of Washington, district guardian of the property and person of George E. Hill, Ellen Kellogg Hill and Eugene C. Hill, and thereupon said Eben Smith qualified as such guardian, and he has ever since been and now is the duly appointed, qualified and acting guardian of the property and persons of George E. Hill, Ellen Kellogg Hill and Eugene C. Hill.

*Third.*

That said George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, Eliza Maude Hill and Eben Smith are each and all of them, and—

(Endorsed :) Stipulation and amended complaint. Filed Jan. 18, 1899, in the United States circuit court. A. Reeves Ayres, clerk, by A. N. Moore, deputy.

15 In the Circuit Court of the United States, District of Washington, Northern Division.

<p>GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL,          by Their Guardian, Eben Smith, and Eliza Maud Hill,          in Her Own Behalf, Plaintiffs,</p>	}	No. 511.
<p>vs.</p>		
<p>THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,          Defendant.</p>	}	

*Answer to Amended Complaint.*

Comes now the above-named defendant and makes answer to the amended complaint of said plaintiffs, this day filed pursuant to the stipulation of the parties, and the direction and order of this court, as follows:

I.

Said defendant, The Mutual Life Insurance Company of New York, a corporation, denies so much of paragraph V of said amended complaint as alleges that this defendant made, or executed, or delivered in the city of New York, State of New York, or at any place outside the State of Washington, the contract or policy of insurance set forth in said complaint. It further denies that the consideration of the said contract of insurance was other than is stated in said contract.

16

II.

It admits that said George Dana Hill mentioned in said complaint died on the fourth day of December, A. D. 1890, but it denies that the said George Dana Hill was at the time of his death insured in said defendant company, as alleged in paragraph VIII of said amended complaint, or at all; or that the said George Dana Hill had been insured in said defendant company at any time subsequent to the twenty-ninth day of April, 1887.

III.

It denies each and every allegation contained in paragraph XIII of said amended complaint.

For a first affirmative defense, the said defendant alleges:

I.

That the defendant is, and was at all times mentioned in the complaint, a corporation, created, organized and existing under and by virtue of the laws of the State of New York, and is and was at all of the said times engaged in transacting a life-insurance business in the Territory, now State, of Washington, under and by virtue of and in pursuance of the laws of said Territory, now State, of Washington, having its principal office for the transaction of business in

said State and Territory at the city of Seattle, Territory, now State, of Washington.

## II.

That on or about the twenty-eighth day of April, A. D. 1886, one George Dana Hill, being the same George Dana Hill named  
17 in the said complaint, and who was at all times herein mentioned a citizen and resident of the Territory, now State, of Washington, made, signed and delivered to the defendant at its office in Seattle aforesaid, his written application to defendant for a policy of insurance upon his life in the sum of twenty thousand (\$20,000) dollars, which application became and was pursuant to its own terms and to the terms of the policy of insurance hereinafter mentioned a part of said policy, and of the *the* contract of insurance evidenced thereby.

## III.

That the said application contained among other things, a stipulation and condition to the following effect:

"And it is agreed that there shall be no contract of insurance until a policy shall have been issued and delivered by the said company, and the first premium thereon paid while the person proposed for insurance is in the same condition of health described in said application."

## IV.

That thereupon, the agent of defendant in Seattle aforesaid transmitted said application of the said George Dana Hill to the agent of the defendant in San Francisco, California, by whom the said application was transmitted to defendant in the city and State of New York.

## V.

That thereafter, to wit, on the twenty-ninth day of April, 1886, the defendant, pursuant to said application, transmitted the policy of insurance referred to in said complaint, to its agent in San

Francisco aforesaid, and thereafter, to wit, on the tenth day  
18 of May, 1886, the agent of the defendant at San Francisco aforesaid transmitted the said policy of insurance to the agent of the defendant in Seattle aforesaid for delivery of the same to the said George Dana Hill, provided the said George Dana Hill should pay to the defendant in Seattle aforesaid, the premium due upon said policy, and said last-named agent of defendant in Seattle aforesaid, on or about the fifteenth day of May, 1886, delivered the said policy to the said George Dana Hill, and the said George Dana Hill then and there paid to the defendant the first premium due upon the said policy.

## VI.

That it was provided in said policy of insurance mentioned in the said complaint, as a condition thereof, as follows: "The annual premium of eight hundred and fourteen dollars shall be paid in advance on the delivery of this policy, and thereafter to

the company, at its home office in the city of New York, on the twenty-ninth day of April in every year during the continuance of this contract."

And it was therein further provided as a condition of said contract as follows, to wit:

"Each premium is due and payable at the home office of the company, in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived.

19 That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract, shall be deducted from the amount of the claim. If this policy shall become void for non-payment of premium, all payments previously made shall be forfeited to the company, except as hereinafter provided."

## VII.

That pursuant to the conditions of the said policy, there became and was due to the defendant as a premium upon said policy of insurance on the twenty-ninth day of April, A. D. 1887, the sum of eight hundred and fourteen (\$814) dollars, and the said George Dana Hill, and the said Ellen Kellogg Hill, his wife, and each and all of the plaintiffs herein, failed, neglected and refused to pay to the defendant, at the time aforesaid, the said sum of eight hundred and fourteen (\$814) dollars, or any part thereof, and ever since that time and up to the time of the death of the said George Dana Hill on the fourth day of December, 1890, the said George Dana Hill and the said Ellen Kellogg Hill, his wife, during her lifetime, and each and all of the plaintiffs, neglected and refused to pay to defendant the said sum or any part thereof, or any other sum or other thing of value whatever, by reason whereof the said policy of insurance became and was on the twenty-ninth day of April, A. D. 1887, according to the conditions aforesaid, void and of no effect.

And for a second affirmative defense the defendant alleges:

20

I.

That at a time more than one year from the time of the issuance of the policy mentioned in the complaint, and during the lifetime of the said George Dana Hill mentioned in the complaint, it was mutually agreed between the defendant and the said George Dana Hill, that the said contract of insurance should be waived, abandoned and rescinded, and the said George Dana Hill and the defendant then by mutual consent waived, abandoned and rescinded the same accordingly, and all their mutual rights and obligations therein and thereunder.



And for a third affirmative defense herein this defendant alleges :

I.

That the defendant is, and at all the times mentioned in the complaint was, a corporation, created, organized and existing under and by virtue of the laws of the State of New York, and is, and was at all of said times, engaged in the transaction of a life-insurance business in the Territory, now State, of Washington under and by virtue, and in pursuance of the laws of the said Territory, now State, of Washington, having its principal office for the transaction of business in said State and Territory at the city of Seattle therein.

II.

That on the twenty-ninth day of April, 1886, defendant, pursuant to the application of said George Dana Hill therefor, he then and there being a resident of Seattle in said Territory, duly executed and delivered to said George Dana Hill its policy of insurance in the sum of twenty thousand (\$20,000) dollars (being the same policy in the complaint described) upon the payment by said George Dana Hill, to wit, at said city of Seattle, of the first annual premium on said policy in the sum of eight hundred and fourteen (\$814) dollars and the said contract was thus entered into in the said city and in the Territory of Washington and took effect there.

III.

That the said policy among its other provisions contained the following: "Each premium is due and payable at the home office of the said company in the city of New York, but will be accepted elsewhere when duly made in exchange for the company's receipt signed by the president or secretary," and it was, upon the execution and delivery of said policy to said George Dana Hill, mutually agreed between the said defendant and the said George Dana Hill that all annual premiums subsequent to that paid at the time of the delivery of said policy should be by the said Hill paid to the defendant at the said city of Seattle, and the defendant's receipt therefor should be at the time of such payment delivered to said Hill at said city of Seattle.

IV.

This defendant alleges that the said plaintiffs, and each of them, should be and are estopped from and should not be permitted to allege or prove that defendant did not mail, or cause to be mailed, or otherwise given to said George Dana Hill a notice stating the amount of premium due on said policy on April 29, 1887, or at any other time, with the place where the same should be paid, the person to whom the same is payable, and stating that unless the premium then due should be paid to the company, or its agents, within thirty days after the mailing of such notice, the policy, and all payments made thereon, should become forfeited, or any other notice prescribed by any statute or statutes of the State of New York

or any other notice than that hereinafter in this paragraph mentioned, for that, shortly prior to and after and on said twenty-ninth day of April, 1887, this defendant in writing, and also personally, notified and informed the said George Dana Hill, at said city of Seattle, that the premium of eight hundred and fourteen dollars, necessary to be paid on said policy for the continuance of said policy of insurance, was due and payable, and said defendant duly demanded payment of said premium in said sum, and at the same time and place tendered the receipt of the defendant therefor, duly signed by its president and secretary; and the said Hill being fully so informed and advised in the premises refused to make payment of said premium, or any part thereof, and then and there intending and for the purpose of inducing defendant to rely upon the same, informed defendant that he, the said George Dana Hill, was unable to pay said premium, and did not intend to make payment thereof, or of any premium thereafter to accrue upon said policy of insurance, but on the contrary he, the said George Dana Hill, intended to allow the said policy to lapse and become forfeited for want of payment of said premium, or of any future premium accruing on said policy; and the said defendant, then and there and ever since

23 relying upon the said representations and conduct on the part of the said George Dana Hill was thereby induced to and did declare the said policy and contract of insurance forfeited and abandoned, and in good faith relying upon said conduct and representations on the part of said George Dana Hill, this defendant was induced to and did fail and abstain from giving or mailing any notice, whether prescribed by statute or otherwise, to the said George Dana Hill, or to any person interested in said policy, concerning the payment of any premium thereon.

Wherefore, the said defendant asks judgment that it be dismissed with its costs.

STRUVE, ALLEN, HUGHES & McMICKEN,  
STRUDWICK & PETERS, *Solicitors for Defendant.*

STATE OF WASHINGTON, } ss:  
County of King,

Sherwood Gillespy, being first duly sworn, on oath, deposes and says: That he is the general agent for the State of Washington of the defendant in the above-entitled action, authorized by it to solicit insurance in said State, and that he makes this affidavit in verification of the foregoing answer on behalf of said defendant. That he has read said answer, knows the contents thereof and believes the same to be true.

SHERWOOD GILLESPIE.

24 Subscribed and sworn to before me this eighteenth day of January, 1899.

H. J. RAMSEY,  
*Notary Public in and for the State of Washington,*  
[NOTARIAL SEAL.] *Residing at Seattle.*

Copy of within amended answer received and due service of same acknowledged this eighteenth day of January, 1899.

S. Warburton,  
*Attorney for Plaintiffs.*

(Endorsed:) Answer. Filed Jan. 18, 1899, in the United States circuit court. A. Reeves Ayres, clerk, by A. N. Moore, deputy.

In the Circuit Court of the United States, District of Washington,  
Northern Division.

GEORGE E. HILL ET AL., Plaintiffs,	} No. 511.
vs.	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.	

*Demurrer.*

Come now the plaintiffs, by their attorneys, and demur to the amended answer of the defendant as follows:

25

I.

Plaintiffs demur to the allegations contained in the first affirmative defense of defendant on the ground that the said first affirmative defense does not state facts sufficient to constitute a defense to plaintiffs' amended complaint.

II.

Plaintiffs demur to the allegations contained in defendant's second affirmative defense on the ground that the said second affirmative defense does not state facts sufficient to constitute a defense to plaintiffs' amended complaint.

III.

Plaintiffs demur to the allegations contained in defendant's third affirmative defense on the ground that the said third affirmative defense does not state facts sufficient to constitute a defense to plaintiffs' amended complaint.

S. Warburton,  
*Attorney for Plaintiffs.*

STATE OF WASHINGTON, } ss:  
County of King, }

S. Warburton, being of the counsel for plaintiffs in the above cause, believe- the foregoing demurrers are well founded in point of law.

S. Warburton.

Service admitted, at Seattle, Jan. 18, 1899.

STRUVE, ALLEN, HUGHES & McMICKEN AND  
STRUDWICK & PETERS, *Attorneys for Defendant.*

26

(Endorsed:) Demurrer to amended answer. Filed Jan. 18, 1899, in the United States circuit court. A. Reeves Ayres, clerk, by A. N. Moore, deputy.

In the Circuit Court of the United States, District of Washington,  
Northern Division.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. Hill, by Their Guardian, Eben Smith, and Eliza Maud Hill, in Her Own Behalf, Plaintiffs, vs. THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.	}	No. 511.
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*Order Sustaining Demurrer and Judgment.*

This cause coming on duly and regularly to be heard upon the plaintiffs' demurrer to the defendant's answer herein, and the court having heard argument of counsel thereon, and having considered the same, and being now fully advised in the premises,

It is ordered that said demurrer be and the same hereby is sustained; to which ruling of the court sustaining said demurrer defendant by its counsel in open court at the time duly excepts, and its exception is separately allowed by the court as to each of the grounds of demurrer.

Thereupon the defendant, by its counsel in open court, announces that it does not desire to amend its said answer, but elects to stand thereon, and refuses to plead further; whereupon the plaintiffs, by their counsel, move the court for judgment in favor of the plaintiffs and against the defendant upon said demurrer; and the court being now fully advised upon the premises, grants said motion and orders judgment accordingly, to which action of the court in granting said motion for judgment and ordering judgment defendant at the time excepts, and its exception is allowed.

It is therefore considered, adjudged, and decreed that the plaintiffs George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, by their guardian Eben Smith, and Eliza Maud Hill in her own behalf, do have and recover of and from the defendant, The Mutual Life Insurance Company of New York, the sum of twenty-four thousand, eighty-six and sixty one-hundredths dollars, with interest thereon from date hereof, together with the costs of this action, taxed at twenty-four and eighty-four one-hundredths dollars, and that execution issue therefor. To which judgment and every part thereof defendant at the time excepts, and its exception is allowed.

Done in open court this eighteenth day of January, 1899.

C. H. HANFORD, *Judge.*

(Endorsed:) Order and judgment. Filed Jan. 18, 1899, in the United States circuit court. A. Reeves Ayres, clerk, by A. N. Moore, deputy.

28 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff  
in Error,

vs.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL, by  
Their Guardian, Eben Smith, and Eliza Maud Hill, in Her  
Own Behalf, Defendants in Error.

*Assignment of Errors.*

In the matter of the petition of The Mutual Life Insurance Company  
of New York, plaintiff in error.

Comes now the above-named plaintiff in error, The Mutual Life Insurance Company of New York, on this twenty-sixth day of January, 1899, by its attorneys, Edward Lyman Short, Struve, Allen, Hughes & McMicken and Strudwick & Peters, and says that in the record and proceedings in the above-entitled matter and cause there is manifest error, of which it makes the following assignment of errors:

I.

That the circuit court of the United States for the district of Washington, northern division, erred in sustaining the demurrer of the plaintiff and defendant in error to the first affirmative answer  
29 and defense of defendant and plaintiff in error, The Mutual Life Insurance Company of New York, to the first cause of action in the amended complaint pleaded.

II.

The said circuit court erred in sustaining the demurrer of said defendant in error and plaintiff to the second affirmative defence of said defendant and plaintiff in error to the cause of action in the amended complaint pleaded.

III.

The said court erred in sustaining the demurrer of the said plaintiff and defendant in error to the third affirmative answer and defense of said defendant and plaintiff in error to the cause of action in said amended complaint set forth.

IV.

The said circuit court erred in sustaining the demurrer of said plaintiff and defendant in error to the answer of defendant and plaintiff in error.

V.

The said circuit court erred in granting judgment in favor of the said plaintiff and defendant in error against the said defendant and plaintiff in error for the amount of said judgment or any sum.

VI.

Because it is manifest upon the issues in said case that said plaintiff and defendant in error are not entitled to judgment.

30

VII.

That said circuit court erred in submitting said cause to trial upon the issues formed by the pleading.

Wherefore, the said plaintiff in error prays that the judgment of the said circuit court of the United States for the district of Washington, northern division, be reversed and that the said circuit court of the United States be ordered to enter an order reversing and setting aside said judgment and granting a new trial in said cause.

EDWARD LYMAN SHORT,

STRUVE, ALLEN, HUGHES & McMICKEN, AND  
STRUDWICK & PETERS,

*Attorneys for Plaintiff in Error and Defendant.*

Copy of the foregoing assignment of errors received and service of same acknowledged this twenty-sixth day of January, 1899.

S. WARBURTON,

*Attorney for Defendants in Error.*

(Endorsed:) Assignment of errors. Filed Jan. 26, 1899, in the United States circuit court. A. Reeves Ayres, clerk, by H. M. Walthew, deputy.

31 In the Circuit Court of the United States, District of Washington, Northern Division, Ninth Circuit.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL,  
by Their Guardian, Eben Smith, and Eliza Maud Hill,  
in Her Own Behalf, Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK  
(a Corporation), Defendant.

No. 511.

*Petition for Order Allowing Writ of Error.*

The said defendant The Mutual Life Insurance Company of New York, a corporation, feeling itself aggrieved by the judgment entered in said cause on the eighteenth day of January, 1899, in favor of said plaintiffs and against said defendant for the sum of twenty-four thousand eighty-six and sixty one-hundredths dollars, with interest thereon from the date of said judgment at the rate of six per cent. per annum, together with said plaintiffs' costs, taxed at twenty-four dollars and eighty-four cents, and directing that execution issue therefor, in which judgment, and the proceedings leading up to the same, certain errors were committed to the prejudice of said defendant, which more fully appear from the assignment of errors which is filed herewith, comes now and prays said court for an order allowing the said defendant to prose-

32

cute a writ of error to the honorable United States circuit court of appeals for the ninth circuit for the correction of the errors complained of under and according to the laws of the United States in that behalf made and provided, and also prays that an order be made, fixing the amount of security which the said defendant shall give upon said writ of error, and that upon the furnishing of said security all further proceedings in this cause be suspended and stayed until the determination of said writ of error by said circuit court of appeals for the ninth circuit. And further prays that a transcript of the record and proceedings and papers in this cause, duly authenticated, may be sent to the circuit court of appeals, and your petitioner will ever pray.

Dated this twenty-sixth day of January, 1899.

EDWARD LYMAN SHORT,  
STRUVE, ALLEN, HUGHES & McMICKEN, AND  
STRUDWICK & PETERS,

*Attorneys for the Defendant, The Mutual Life Insurance  
Company of New York, a Corporation.*

Copy of the foregoing petition received and service of same acknowledged this twenty-sixth day of January, 1899.

S. WARBURTON,  
*Attorneys for Plaintiff.*

(Endorsed:) Petition for order allowing writ of error. A. Reeves Ayres, clerk, by H. M. Walthew, deputy. Filed Jan. 26, 1899, in the United States circuit court.

33 In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Circuit.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. Hill, by Their Guardian, Eben Smith, and Eliza Maud Hill, in Her Own Behalf, Plaintiffs,	} No. 511.
vs.	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.	

*Order Granting Writ of Error and Fixing Amount of Bond.*

This cause coming on this day to be heard in the court-room of said court in the city of Seattle, Washington, upon the petition of the defendant, The Mutual Life Insurance Company of New York, a corporation, herein filed, praying the allowance of a writ of error to the United States circuit court of appeals for the ninth circuit, together with the assignment of errors, also herein filed, in due time, and also praying that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the said United States circuit court of appeals for the ninth circuit, and that such other and further proceeding may be had as may be proper in the premises.

The court having duly considered the same, does hereby allow the said writ of error prayed for, and it is ordered that upon the giving by said defendant The Mutual Life Insurance Company of New York, a corporation, of a bond according to law in the sum of twenty-eight thousand dollars, the same shall operate as a supersedeas bond and all proceedings be stayed pending the determination of said writ of error.

Dated this twenty-sixth day of January, 1899.

C. H. HANFORD, *Judge*.

Copy of the foregoing order received and service of same acknowledged this twenty-sixth day of January, 1899.

S. Warburton,  
*Attorney for Plaintiffs.*

(Endorsed:) Order granting writ of error and fixing amount of bond. Filed January 26, 1899, in the United States circuit court. A. Reeves Ayres, clerk, by H. M. Walthew, deputy.

35 In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Circuit.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. Hill, by Their Guardian, Eben Smith, and Eliza Maud Hill, in Her Own Behalf, Plaintiffs,	} No. 511.
<i>vs.</i>	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.	

*Supersedeas Bond.*

Know all men by these presents, that we, The Mutual Life Insurance Company of New York, a corporation, the above-named defendant, as principal, and M. F. Backus and E. O. Graves of King county, Washington, as sureties, are held and firmly bound unto George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, by their guardian, Eben Smith, and Eliza Maud Hill in her own behalf, the above-named plaintiffs, in the sum of twenty-eight thousand dollars, to be paid to said plaintiffs, their executors, administrators, and assigns, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-sixth day of January, 1899.

36 The condition of the above obligation is such that whereas, in the above court and cause, final judgment was rendered against the said defendant and in favor of said plaintiff in the sum of twenty-four thousand eighty-six and sixty one-hundredths dollars, with interest and costs; and

Whereas, the said defendant has obtained from said court a writ of error to reverse the judgment in said action, and a citation directed to the plaintiffs is about to be issued, citing and admonish-



ing them to be and appear in the United States circuit court of appeals for the ninth circuit, to be held at San Francisco, in the State of California:

Now, therefore, if the said defendant, The Mutual Life Insurance Company, a corporation, of New York, shall prosecute the said writ of error to effect, and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation is to be void, otherwise to remain in full force and effect.

THE MUTUAL LIFE INSURANCE CO. OF  
NEW YORK, [SEAL.]  
By SHERWOOD GILLESPIE,  
*Its General Agent for the State of Washington,*  
And by STRUVE, ALLEN, HUGHES & McMICKEN,  
*Its Attorneys.*  
M. F. BACKUS. [SEAL.]  
E. O. GRAVES. [SEAL.]

[50c. revenue stamp affixed and cancelled.]

37 UNITED STATES OF AMERICA, }  
*District of Washington, Northern Division,* } ss:  
*King County,* }

M. F. Backus and E. O. Graves, sureties on the foregoing bond, being each duly sworn, each for himself deposes and says: That he is a freeholder in said district, and that he, the said M. F. Backus, is worth the sum of twenty-eight thousand dollars; and that he, the said E. O. Graves, is worth the sum of twenty-eight thousand dollars; and in each case exclusive of property exempt from execution, and over and above all debts and liabilities.

M. F. BACKUS.  
E. O. GRAVES.

Subscribed and sworn to before me this twenty-sixth day of January, one thousand eight hundred and ninety-nine.

[SEAL.]

JAMES KIEFER,  
*United States Commissioner.*

[10c. revenue stamp affixed and canceled.]

The sufficiency of the sureties of the foregoing bond approved by me this twenty-sixth day of January, 1899.

C. H. HANFORD,  
*Judge of said Court.*

Copy of foregoing bond received and service of same acknowledged this twenty-sixth day of January, 1899.

S. WARBURTON,  
*Attorney for Plaintiffs.*

38 (Endorsed:) Supersedeas bond. Filed January 26, 1899,  
in the United States circuit court. A. Reeves Ayres, clerk,  
by H. M. Walthew, deputy.

*Writ of Error (Copy).*

UNITED STATES OF AMERICA, ss :

The President of the United States of America to the judges of the circuit court of the United States for the district of Washington, northern division, Greeting :

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said circuit court, before you, or some of you, between George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, by their guardian Eben Smith, and Eliza Maud Hill in her own behalf, plaintiffs, and The Mutual Life Insurance Company of New York, defendant, a manifest error hath happened, to the great damage of the said The Mutual Life Insurance Company of New York, a corporation, defendant, as is said and appears by the complaint, we being willing that such error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if any judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justice of the United States circuit court of appeals for the ninth circuit, at the court-room of said court,

in the city of San Francisco, in the State of California, together with this writ, so that you have the same at the said place before the justice aforesaid, on the twenty-first day of February, 1899, that the record and proceedings aforesaid being inspected, the said justice of the said circuit court of appeal may cause further to be done therein to correct that error what of right and according to law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twenty-sixth day of January, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

A. REEVES AYRES,

*Clerk of said Circuit Court of the United States for  
the Ninth Circuit, District of Washington,*

By H. M. WALTHER, Deputy.

[Seal United States Circuit Court.]

The foregoing writ is hereby allowed.

C. H. HANFORD,

*United States District Judge for the District of Washington,  
Sitting as Judge of said Circuit Court of the United States  
for the Ninth Circuit, District of Washington.*

[Seal United States Circuit Court.]

Received this twenty-sixth day of January, 1899, a true copy of the foregoing writ of error, for defendants in error George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, by their guardian Eben Smith, and Eliza Maud Hill, in her own behalf.

A. REEVES AYRES,

*Clerk of the Circuit Court of the United States for the Ninth Circuit, District of Washington, Northern Division,*

By H. M. WALTHER, *Deputy.*

[Seal United States Circuit Court.]

(Endorsed :) Writ of error. Filed January 26, 1899, in the United States circuit court. A. Reeves Ayres, clerk, by H. M. Walthew, deputy.

*Citation (Copy).*

UNITED STATES OF AMERICA, ss :

To George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, by their guardian, Eben Smith, and Eliza Maud Hill, in her own behalf, Greeting :

You are hereby cited and admonished to be and appear at a term of the United States circuit court of appeals for the ninth circuit, to be holden in the city of San Francisco, State of California, on the twenty-first day of February, 1899, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of the State of Washington, northern division, wherein The Mutual Life Insurance Company of New York, a corporation, is plaintiff in error and you are defendant- in error, to show  
41 cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated the twenty-sixth day of January, 1899.

C. H. HANFORD,

*United States District Judge for the District of Washington,  
Sitting as Judge of said Circuit Court of the United States  
for the Ninth Circuit, District of Washington.*

[Seal United States Circuit Court.]

Attest :

A. REEVES AYRES,

*Clerk of said Circuit Court of the United States  
for the Ninth Circuit, District of Washington,  
By H. M. WALTHER, Deputy.*

We hereby, this twenty-sixth day of January, 1899, acknowledge service of the foregoing citation at Seattle, Washington.

S. Warburton,

*Counsel for George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, by Their Guardian, Eben Smith, and Eliza Maud Hill, in Her Own Behalf.*

(Endorsed :) Citation. Filed Jan. 26, 1899, in the United States circuit court. A. Reeves Ayres, clerk, by H. M. Walthew, deputy.

42 In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Circuit.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. HILL, by Their Guardian, Eben Smith, and Eliza Maude Hill, in Her Own Behalf, Plaintiffs,	vs,	THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Defendant.
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*Præcipe for Record.*

To the clerk of the above-named court :

In your return to the writ of error issued out of the circuit court of appeals for the ninth circuit to the above-named circuit court of the United States, you will please include the following :

- (1.) Complaint (as amended by substitution of a page in accordance with stipulation filed January 18, 1899), filed October 19, 1895.
- (2.) Præcipe for appearance of attorneys for plaintiffs, filed October 19, 1895.
- (3.) Præcipe for appearance of attorneys for defendant, filed November 13, 1895.
- (4.) Stipulation for amendment of complaint and relating to order of proceedings, filed January 18, 1899.
- 43 (5.) Answer to amended complaint, filed January 18, 1899.
- (6.) Demurrer to answer, filed January 18, 1899.
- (7.) Order and judgment, filed January 18, 1899.
- (8.) Assignment of errors, filed January 26, 1899.
- (9.) Petition for writ of error, filed January 26, 1899.
- (10.) Order fixing amount of supersedeas bond, filed January 26, 1899.
- (11.) Supersedeas bond, filed January 26, 1899.
- (12.) Writ of error, filed January 26, 1899.
- (13.) Copy of writ of error lodged with clerk for defendant in error, filed January 26, 1899.
- (14.) Citation with acknowledgment of service, filed January 26, 1899.

STRUVE, ALLEN, HUGHES & McMICKEN,  
*Attorneys for Defendant.*

(Endorsed :) Præcipe for record. Filed in the United States circuit court Feb. 15, 1899. A. Reeves Ayres, clerk, by H. M. Walthew, deputy.

44 In the Circuit Court of the United States for the District  
of Washington, Northern Division.

GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. Hill, by Their Guardian, Eben Smith, and Eliza Maude Hill, in Her Own Behalf, Plaintiffs,	} No. 511.
vs.	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Defendant.	

*Clerk's Certificate to Transcript.*

UNITED STATES OF AMERICA, } ss :  
District of Washington, }

I, A. Reeves Ayres, clerk of the circuit court of the United States for the district of Washington, do hereby certify that the foregoing thirty-seven (37) typewritten pages numbered from one (1) to thirty-seven (37), both inclusive, constitute and are a complete, true, and correct copy of the record papers, and all proceedings had in the foregoing-entitled cause, as the same remains of record and on file in the office of said circuit court, and that the same, which I transmit, constitute my return to the annexed writ of error lodged and filed in my office on the twenty-fourth day of January, 1899.

45 I further certify that no opinion of the court was rendered or filed in said cause.

I further certify that I hereto annex and herewith transmit the original citation in said cause.

I further certify that the cost of preparing and certifying the foregoing transcript of record and return is the sum of \$11.45, and that the same has been paid me in full by Struve, Allen, Hughes & McMicken, attorneys for the plaintiff in error.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, this seventeenth day of February, A. D. 1899.

A. REEVES AYRES,  
*Clerk of the United States Circuit Court for the  
District of Washington, Ninth Circuit,*  
By R. M. HOPKINS,  
*Deputy Clerk.*

[SEAL.]

[Canceled 10-ct. int. rev. stamp.]

*Writ of Error (Original).*

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the judges of the circuit court of the United States for the district of Washington, northern division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said circuit court  
46 before you, or some of you, between George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, by their guardian Eben Smith, and Eliza Maude Hill in her own behalf, plaintiffs, and The Mutual Life Insurance Company of New York, defendant, a manifest error hath happened to the great damage of the said The Mutual Life Insurance Company of New York, a corporation, defendant, as is said and appears by the complaint; we being willing that such error, if any hath been, shall be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if any judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justice of the United States circuit court of appeals for the ninth circuit, at the court-rooms of said court in the city of San Francisco, in the State of California, together with this writ, so that you have the same at the said place before the justice aforesaid, on the twenty-first day of February, 1899.

That the record and proceedings aforesaid being inspected, the said justice of the said circuit court of appeals may cause further to be done therein to correct that error what of right and according to law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twenty-sixth day of January, in the year of our Lord one thousand eight hundred and  
47 ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

A. REEVES AYRES,

*Clerk of said Circuit Court of the United States for the Ninth Circuit, District of Washington,*

[SEAL.]

By H. M. WALTHER, Deputy.

The foregoing writ is hereby allowed.

C. H. HANFORD,

*United States District Judge for the District of Washington,  
Sitting as Judge of said Circuit Court of the United States  
for the Ninth Circuit, District of Washington.*

[SEAL.]

Received this twenty-sixth day of January, 1899, a true copy of the foregoing writ of error, for defendants in error George E. Hill,

Ellen Kellogg Hill, Eugene C. Hill, by their guardian Eben S. Hill and Eliza Maude Hill, in her own behalf.

A. REEVES AYRES,

*Clerk of the Circuit Court of the United States for the Ninth Circuit, District of Washington, Northern Division.*

[SEAL.]

By H. M. WALTHER, Deputy.

(Endorsed :) Original. No. —. In the circuit court of appeals for the ninth circuit. The Mutual Life Insurance Company of New York, plaintiff in error, vs. George E. Hill *et al.*, defendants in error. Writ of error. Filed Jan. 26, 1899, in the United States circuit court. A. Reeves Ayres, clerk, by H. M. Walther, deputy.

*Citation (Original).*

UNITED STATES OF AMERICA, ss :

To George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, by their guardian, Eben Smith, and Eliza Maude Hill, in her own behalf. Greeting :

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the ninth circuit to be holden in the city of San Francisco, State of California, on the twenty-first day of February, 1899, pursuant to a writ of error in the clerk's office of the circuit court of the United States for the district of the State of Washington, northern division, wherein the Mutual Life Insurance Company of New York, a corporation, is plaintiff in error, and you are defendant in error, to show cause why judgment in the said writ of error ment should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated the twenty-sixth day of January, 1899.

C. H. HANFORD,

*United States District Judge for the District of Washington,  
Sitting as Judge of said Circuit Court of the United States  
for the Ninth Circuit, District of Washington.*

[SEAL.]

49

Attest : A. REEVES AYRES,

*Clerk of said Circuit Court of the  
United States for the Ninth Circuit,  
District of Washington.*

By H. M. WALTHER, Deputy.

We hereby, this twenty-sixth day of January, 1899, acknowledge service of the foregoing citation at Seattle, Washington.

S. WARBURTON,

*Counsel for George E. Hill, Ellen Kellogg Hill,  
Eugene C. Hill, by Their Guardian, Eben Smith,  
and Eliza Maude Hill, in Her Own Behalf.*

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(Endorsed :) Original. No. —. In the circuit court of appeals for the ninth circuit. The Mutual Life Insurance Company of New York, plaintiff in error, *vs.* George E. Hill *et al.*, defendant in error. Citation. Filed Jan. 26, 1899, in the United States circuit court. A. Reeves Ayres, clerk, by H. M. Walthew, deputy.

(Endorsed :) No. 518. United States circuit court of appeals for the ninth circuit. Mutual Life Insurance Company of New York (a corporation), plaintiff in error, *vs.* George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, by their guardian, Eben Smith, and Eliza Maude Hill, in her own behalf, defendants in error. In error to the circuit court of the United States for the district of Washington, northern division. Transcript of record. Filed Feb. 20, 1899. F. D. Monekton, clerk, by Meredith Sawyer, deputy clerk.

50 At a stated term, to wit, the October term, A. D. 1898, of the United States circuit court of appeals, for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Wednesday, the seventeenth day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

Present : The Honorable William B. Gilbert, circuit judge ; Honorable Erskine M. Ross, circuit judge ; Honorable Thomas P. Hawley, district judge.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK  
(a Corporation)  
*vs.*  
GEORGE E. HILL ET AL.  
  
*Order of Submission.*

} No. 518.

Ordered cause argued by John B. Allen and R. C. Strudwick, Esquires, counsel for the plaintiff in error, and Stanton Warburton, Esquire, counsel for the defendants in error, and submitted to the court for consideration and decision.

51 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW  
York (a Corporation), Plaintiff in Error,  
*vs.*  
GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE  
C. Hill, by Their Guardian, Eben Smith, and  
Eliza Maud Hill, in Her Own Behalf, Defend-  
ants in Error.

} No. 518. 4543.

*Opinion U. S. Circuit Court of Appeals.*

In error to the circuit court of the United States for the district of Washington, northern division.

This action was brought by the children of George Dana Hill in their own name where of age, and by their guardian where under



age, to recover the amount of a policy of insurance upon the life of their deceased father.

The amended complaint alleged that on April 29, 1886, in consideration of the sum of \$814 paid by George Dana Hill, the insurance company (plaintiff in error herein) made and delivered to him in the city of New York, a policy upon his life; the insurance to be paid to his wife, if living at his death, or in case of her death before that time to their children. This policy of insurance is set forth in the complaint, and reads as follows:

52 "In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay at its home office in the city of New York, unto Ellen Kellogg Hill, wife of George Dana Hill of Seattle, in the county of King, Washington Territory, for her sole use, if living, in conformity with the statute, and if not living, to such of the children of their bodies as shall be living at the death of the said wife or to their guardian, for their use, twenty thousand dollars (\$20,000) upon acceptance of satisfactory proofs at its said office of the death of the said George Dana Hill during the continuance of this policy, upon the following condition; and subject to the provisions, requirements, and benefits stated on the back of this policy, which are hereby referred to and made part hereof.

The annual premium of eight hundred and fourteen dollars (\$814) shall be paid in advance on the delivery of this policy, and thereafter to the company, at its home office, in the city of New York, on the twenty-ninth day of April in every year during the continuance of this contract." \* \* \*

Upon the back of this policy are provisions to the effect that while the payments are due and payable at the home office they will be accepted elsewhere when made in exchange for the company's properly signed receipt; that notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and that any further notice required by any statute is expressly waived.

53 It is alleged in the complaint that the application for insurance contained the following agreement: "It is agreed that there shall be no contract of insurance until a policy shall have been delivered and issued by said company, and the first premium thereon paid while the person proposed for insurance is in the same condition of health described in this application."

It is further alleged in the complaint, "that on the twenty-third day of December, 1890, the defendant was notified of the death of said George Dana Hill, and requested to furnish plaintiffs necessary blanks in order that plaintiffs might furnish proofs of death as required by the rules and regulations of defendant company; that on the third day of February, 1891, said defendant in reply thereto informed and declared to said plaintiffs that said contract or policy of insurance above set forth had been forfeited by the non-payment of a premium; that said defendant thereby waived the right to claim any other or any proofs of the death of said George Dana

Hill; that said George Dana Hill during his lifetime duly performed all the conditions of said contract necessary by him to be performed; that the defendant has wholly failed to pay to plaintiffs said policy of insurance or said sum of twenty thousand dollars (\$20,000) or any part thereof."

The answer to the amended complaint admits the issuance of the policy; but denies that it was delivered in the city of New York, or any place outside of the State of Washington; it denies all allegations of performance of the conditions of the contract on the part of the insured.

54 Three affirmative defenses are pleaded to the amended complaint. The first alleges that the insurance company was transacting its business, at the time the policy was issued, in the State of Washington, having its principal office at Seattle in said State; that it had complied with the laws of the State relative to foreign corporations transacting business in it; that before the time of and subsequent to the taking out of the insurance George Dana Hill was a citizen and resident of the Territory and State of Washington; that at Seattle he made his application for the insurance; that this application was transmitted to the agent of the insurance company at San Francisco, and by him to the insurance company in the city of New York; that the insurance company, pursuant to the application, made the policy mentioned in the amended complaint, and sent it to the agent at San Francisco, who afterward transmitted it to the agent in Seattle, and that there the first premium was paid and the policy delivered to the insured; that there became due on the policy April 29, 1887, a premium of \$814, which has never been paid; that both the insured and the beneficiary refused to make payment of any part of it and from that time forth until the death of the insured nothing whatever has been paid on account of any of the premiums; that the policy became void upon such default and refusal.

The second affirmative defense alleged that at a time more than one year from the time of the issuance of the policy, mentioned in the complaint, and during the lifetime of the said George Dana Hill, it was mutually agreed between the defendant and the said George Dana Hill that the said contract of insurance should be waived, abandoned and rescinded, and the said George Dana Hill  
55 and the defendant then by mutual consent waived, abandoned and rescinded the same accordingly, and all their mutual rights and obligations therein and thereunder.

The third affirmative defense, after stating the provisions of the contract, alleged that the plaintiffs and each of them should be, and are, estopped from and should not be permitted to allege or prove that defendant did not mail or cause to be mailed, or otherwise give to said George Dana Hill a notice stating the amount of premium due on said policy on April 29, 1887, or at any other time, with the place where the same should be paid, the person to whom the same is payable, and stating that unless the premium then due should be paid to the company, or its agents, within thirty days after the mailing of such notice, the policy and all payments made thereon

should become forfeited, or any other notice prescribed by any statute or statutes of the State of New York, or any other notice than that hereinafter mentioned; for that shortly prior to and after and on said twenty-ninth day of April, 1887, said defendant in writing and also personally notified and informed the said George Dana Hill, at said city of Seattle, that the premium of \$814, necessary to be paid on said policy for the continuance of this policy of insurance was due and payable; that said defendant duly demanded payment of said premium in said sum, and at the same time and place tendered the receipt of the defendant therefor, duly signed by its president and secretary; that the said Hill, being fully so informed and advised in the premises, refused to make payment of this premium, or any part thereof, and then and there intending and for the purpose of inducing the defendant to rely upon the same, informed the defendant that he, the said George Dana

56 Hill, was unable to pay such premium and did not intend to make payment thereof, or of any premium thereafter to accrue on said policy of insurance, but, on the contrary, he intended to allow the said policy to lapse and become forfeited for want of payment of said premium, or any future premium accruing on said policy; that the said defendant then and there and ever since relying upon the said representation and conduct on part of the said George Dana Hill, was thereby induced to and did declare the said policy and contract of insurance forfeited and abandoned, and that in good faith relying upon said conduct and representations, on the part of the said George Dana Hill, defendant was induced to and did fail and abstain from giving or mailing any notice, whether prescribed by statute or otherwise, to the said George Dana Hill, or to any person interested in said policy, concerning the payment of any premium thereon.

A demurrer was interposed to each of these defenses on the ground that each of them failed to state facts sufficient to constitute a defense to plaintiffs' amended complaint.

Upon argument, each of these demurrers was sustained and exceptions taken by the defendant. The plaintiff in error elected to stand upon its pleadings, and declined to plead further. Thereupon the defendant in error moved the court for judgment, and the court granted the motion against the exceptions of the plaintiff in error, and rendered a judgment against the insurance company for \$24,086.61, with interest from the date of the judgment, and costs.

57 The statute of New York regulating the forfeitures of life-insurance policies, as amended May 23, 1877, provides as follows:

"SEC. 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due

on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last-known post-office address, postage paid by the company, or by an agent of such company, or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or  
 58      lapsed until the expiration of thirty days after the mailing of such notice. Provided, however, that a notice stating when the premium will fall due and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for.

"SEC. 2. The affidavit of any one authorized by section one to mail such notice, that the same was duly addressed to the person whose life is assured by the policy, or to the assignee of the policy, if notice of the assignment has been given to the company, in pursuance of said section, shall be presumptive evidence of such notice having been given."

Edward Lyman Short, John B. Allen, and R. C. Strudwick, for plaintiff in error.

Struve, Allen, Hughes & McMicken, and Strudwick & Peters, of counsel.

S. Warburton, for defendants in error; Eben Smith, of counsel.

Before Gilbert and Ross, circuit judges, and Hawley, district judge.

HAWLEY, district judge (after stating the facts as above), delivered the opinion of the court:

This action was brought upon a policy of insurance issued by the plaintiff in error, April 29, 1886, insuring the life of George Dana Hill for twenty thousand dollars, upon which the first annual premium of \$814 was paid when the policy was delivered. No other premiums were ever paid or tendered upon this policy; no notice  
 59      was ever given by the insurance company to the insured, as required by the laws of the State of New York, to the effect, among other things, that unless the said premium or interest due on said policy shall be paid, the company within thirty days

after the mailing of such notice, "the said policy and all payments thereon will become forfeited and void."

On December 4, 1890, George Dana Hill died. His surviving beneficiaries under the policy are defendants in error. Judgment was entered in their favor upon the pleadings on January 18, 1899, for \$24,086.61, with interest and costs.

The policy of the insurance and all the circumstances in relation thereto and in connection therewith, and all the facts concerning the action of the court in sustaining the demurrer of the defendants in error and ordering judgment, are set forth in the statement of the case. There is no controversy as to the facts. The determination of the case rests solely upon the principles of law that are to be applied to the facts. These are important, and deserving of careful, painstaking, and deliberate consideration.

It is contended by the plaintiff in error, that the court erred in holding that the contract is to be governed by the statute of the State of New York. This question is not a new one in this court. It has been twice before presented, discussed, considered and decided.

*Equitable Life v. Nixon*, 81 Fed., 796;

*Equitable Life v. Trimble*, 83 Fed., 85.

60 After due deliberation upon the facts, and careful examination of the authorities, this court arrived at the conclusion that the contract there in question—which, in so far as the legal principles are involved, cannot be distinguished from the facts of this case—was a New York contract. Citing in support thereof

*Wayman v. Southard*, 10 Wheat., 48;

*Pritchard v. Norton*, 106 U. S., 124, 136, 141; 1 Sup. Ct., 102;

*Bank v. Hume*, 128 U. S., 195, 206; 9 Sup. Ct., 41;

*Coghlan v. Railroad Co.*, 142 U. S., 101, 109; 12 Sup. Ct., 150;

*Hall v. Cordell*, 142 U. S., 116, 120; 12 Sup. Ct., 154.

In *Equitable Life v. Nixon*, as in this case, it was contended that the statement made by the insured when requested to pay the premium due upon the policy, that he did not intend to keep the policy in force, amounted in law to a waiver, on the part of both the insured and the company, of the notice required to be given by the statute of New York. Replying to this contention, the court said: "That the statute of New York prescribes the condition upon which a policy may be forfeited for the non-payment of a premium. The statute is mandatory, and controls the contract. Its provisions are not subject to be set aside or waived either by the company, or the assured, or by both together.

*Society v. Clements*, 140 U. S., 226, 233; 11 Sup. Ct., 822;

*Hicks v. Insurance Co.*, 9 C. C. A., 215; 60 Fed., 690;

*Griffith v. Insurance Co. (Cal.)*, 36 Pac., 117;

*Warner v. Association*, 100 Mich., 157; 58 N. W., 667."

61 Entertaining no doubt of the correctness of the conclusions therein reached, we respectfully decline to further discuss the same identical questions. It is enough to say, that we adhere to the views therein expressed.

It is next contended by the plaintiff in error, that the judgment of the circuit court should be reversed because it is rendered, not upon the cause of action alleged in the amended complaint, but upon a cause of action entirely different in its scope, effect and meaning from the one alleged in the complaint; that, in point of fact, the right of the plaintiffs in the action to recover must be determined by the allegations of their complaint; that courts should not permit them to allege one ground of recovery in their complaint, and then afterward to rely upon another ground; that to permit such a course constitutes a departure not recognized by the law; that it is equally a departure where the plaintiffs bring an action relying upon the common or general law, and then attempt to recover by virtue of a statute; that the one is a departure from fact to fact, the other a departure from law to law. To quote from counsel's brief, "A party who pleads a specific contract, and performance on his part of its conditions as his right to recover, is not permitted, after performance has been controverted, to confess his non-compliance and shift his right of recovery to an unpleaded statute of a foreign State, and assert non-compliance with its provisions on the part of defendant, and adopt the defendant's non-compliance with the unpleaded statute as his own excuse for non-compliance with the conditions of the contract alleged in his complaint. The right of

62 action alleged and abandoned is the act of the party; that not alleged, but relied upon, is the act of the legislature of New York. With performance of the conditions alleged, the right of action is perfect, regardless of the New York statute. Without performance of the conditions alleged, there is no right of action whatever, unless it can be established through the statute of New York. If the statute of New York, instead of performance of the conditions of the contract by defendant in error, affords the ground of recovery, then pleading of the statute is indispensable."

In line with this contention it is also argued by the plaintiff in error, that the defendants in error were not entitled to judgment after the demurrer had been sustained to the affirmative answers and defenses, because issue was joined upon the allegations of performance of the conditions precedent on the part of the insured entitling defendants in error to a recovery.

Of course, the complaint should allege the actual performance of every condition precedent to the plaintiff's right of recovery. The rights of the parties must be determined upon the facts which are put in issue by the pleadings. There is always a departure when a party quits, or departs from, the case which he first made and has recourse to another, and the court is not justified in rendering judgment in favor of a plaintiff not warranted by the facts set forth in his pleadings.

The general principles of law contended for by counsel are undoubtedly correct. But, in so far as it is sought to apply them to



the case in hand, it becomes our duty to carefully consider the allegations of the complaint, and therefrom, in connection with the affirmative defense set up in the answer, determine whether or not

the court erred in rendering judgment upon the pleadings.

63 In the first place, the cases cited and relied upon by the plaintiff in error are clearly distinguishable in their facts from the case at bar, in this; that the plaintiff's right of recovery therein rested solely upon another separate and distinct cause of action from the one stated in their complaint. In the present case the right of the defendants in error to recover is based exclusively upon the contract set out in their complaint, to wit, the policy of insurance. The cause of action set out in the complaint was based upon the identical facts upon which the court gave judgment. There was, therefore, no departure in this case, either from fact to fact, or from law to law, and hence the principle contended for has no application to this case. There was no necessity for the defendants in error to plead the statute of New York. The United States courts take judicial notice of all the public statutes of the several States. Moreover, the question of forfeiture was solely a matter of defense. It is not considered good pleading to anticipate matters of defense.

In the second place, the complaint did not allege that the insured had, during his lifetime, complied with each and every covenant on his part to be performed. The allegation is: "That said George Dana Hill during his lifetime duly performed all the conditions of said contract necessary by him to be performed." The natural effect and legal conclusion to be drawn from this averment is, that he had only done those things which he was required to do in order to keep the policy alive, of binding force and effect, and to show that it was an existing valid contract at the time of Hill's death, and that he had not during his lifetime done any act, or failed to perform any act, that forfeited his rights under said policy, or

64 which would in any manner deprive the beneficiaries of their rights thereunder. There is no allegation in the complaint that the insured paid any other than the first premium. The position taken by the defendants in error was that it was only necessary for them to show this fact in order to entitle them to recover. They never made any departure from this position. They never claimed that they had any right to recover upon any other ground. They recovered upon that ground alone. This was their first, last and only contention.

The affirmative matters alleged in the answer constituted no defense to the cause of action alleged in the complaint.

The contract of insurance became complete upon the payment of the first premium. It was kept alive by the provisions of the statute of New York, because the contingency of forfeiture, as therein provided for, had not happened. The contract is to be read in the light of the statute the same as if the statute had literally been incorporated in the policy. It was not essential to the right of recovery herein, that the defendants in error should have paid, or tendered payment, of the premiums due on the policy before com-

mening the action. When Hill died the relation of debtor and creditors existed between the insurance company and the beneficiaries named in the policy. The unpaid premiums, with legal interest from the date they became payable, constituted a claim on behalf of the insurance company to be deducted when the company paid the amount due on the policy; thus leaving it in precisely the same situation in which it would have been if the premiums had been paid when they became due. The complaint stated a good  
65 and complete cause of action. There could not be any forfeiture of the policy unless the insurance company in its answer alleged, and if a trial was had, proved non-payment of a premium due after regular service of the notice of non-payment, as required by the statute.

*Carter v. Brooklyn Life Ins. Co.*, 110 N. Y., 16;  
*Phelan v. N. Y. M. L. Ins. Co.*, 113 N. Y., 147;  
*Baxter v. Brooklyn Life Ins. Co.*, 119 N. Y., 450;  
*De Freece v. N. L. Ins. Co.*, 135 N. Y., 144;  
*Griesemer v. Mutual Life Ins. Co.*, 10 Wash., 203;  
*Griffith v. Life Ins. Co.*, 101 Cal., 627, 642;  
*Osborne v. Home Life Ins. Co.*, 56 Pac. Rep., 616;  
*Hicks v. National Life Ins. Co.*, 60 Fed., 690, 692;  
*Mullen v. Mutual Life Ins. Co.*, 34 N. W., 605.

The plea of estoppel, as set forth in the third affirmative defense, is but another name for waiver. There is no question concerning the plea of estoppel that can be distinguished from the question as to the plea of waiver. As the parties could not waive the requirements of the statute, as to the manner in which the policy could be forfeited, how could the beneficiaries who had vested rights therein be divested of such rights, except in the manner provided by law? They certainly could not be bound by any declarations which their father may have made in his lifetime, to any agent or officer of the insurance company, as to his inability to pay the premium then due upon the policy; or that he did not intend to pay that, or any future premium; or that the insurance company might  
66 consider the policy forfeited without giving the notice specified in the statute. To so hold would entirely abrogate the provisions of the statute and of the policy.

As was said by the court in *Baxter v. Brooklyn Life Insurance Company*, "When the provisions of this statute are adopted in a contract of insurance, for the purpose of modifying the forfeiture clause and the other strict conditions contained therein, then the clause and these conditions should be so construed as to give to the assured the full benefit contemplated without altering any other provision of the policy, if this can be done without violating any rule of law."

The judgment of the circuit court is affirmed, with costs.

(Endorsed :) Opinion. Filed October 2, 1899. F. D. Monckton, clerk.



67 United States Circuit Court of Appeals for the Ninth Circuit,  
October Term, 1899.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Plaintiff in Error,	}	No. 518.
v.		
GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. Hill, by Their Guardian, Eben Smith, and Eliza Maud Hill, in Her Own Behalf, Defendants in Error.		

*Judgment U. S. Circuit Court of Appeals.*

In error to the circuit court of the United States for the district of  
Washington, northern division.

This cause came on to be heard on the transcript of the record  
from the circuit court of the United States for the district of Wash-  
ington, northern division, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged  
by this court, that the judgment of the said circuit court in this  
cause be, and the same is hereby, affirmed, with costs.

(Endorsed :) Judgment. Filed Oct. 2, 1899. F. D. Monckton,  
clerk.

68 At a stated term, to wit, the October term, A. D. 1899, of  
the United States circuit court of appeals, for the ninth cir-  
cuit, held at the court-room, in the city and county of San Francisco,  
on Monday, the ninth day of October, in the year of our Lord one  
thousand eight hundred and ninety-nine.

Present: The Honorable William B. Gilbert, circuit judge; Hon-  
orable Erskine M. Ross, circuit judge; Honorable Thomas P. Haw-  
ley, district judge.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation)	}	No. 518.
v.		
GEORGE E. HILL ET AL.		

*Order Staying Mandate.*

Upon motion of Warren Gregory, Esquire, ordered mandate  
herein stayed until the further order of the court.

69 United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a Corporation), Plaintiff in Error,	} No. 518.
<i>v.</i>	
GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. Hill, by Their Guardian, Eben Smith, and Eliza Maude Hill, in Her Own Behalf, Defendants in Error.	

*Clerk's Certificate to Transcript, U. S. Circuit Court — Appeals.*

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing sixty-eight (68) pages, numbered from one (1) to sixty-eight (68) inclusive, to be a full, true and correct copy of the transcript of the record, the order of submission, the opinion, the judgment, and the order staying mandate in the above-entitled cause, as the originals thereof remain and appear of record in my office, and that the same together constitutes a copy of the entire record of the case in said

United States circuit court of appeals for the ninth circuit.  
70 Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this fourteenth day of October, A. D. 1899.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled Oct. 14, '99. F. D. M.]



71 UNITED STATES OF AMERICA, ss :

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting :

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The Mutual Life Insurance Company of New York is plaintiff in error and George E. Hill, Ellen Kellogg Hill, Eugene C. Hill, by their guardian, Eben Smith, and Eliza Maud Hill, in her own behalf, are defendants in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of Washington, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixth day of February, in the year of our Lord one thousand nine hundred.

JAMES H. MCKENNEY,  
*Clerk of the Supreme Court of the United States.*

[Endorsed :] Supreme Court of the United States. No. 453, October term, 1899. The Mutual Life Ins. Co. of New York *vs.* George E. Hill *et al.* Writ of certiorari. Filed Feb. 15, 1900. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY, Petitioner and	} No. 518.
Plaintiff in Error,	
vs.	
GEORGE E. HILL, ELLEN KELLOGG HILL, EUGENE C. Hill, by Their Guardian, Eben Smith, and Eliza Maude Hill, in Her Own Behalf.	

*Stipulation as to Return of the Writ of Certiorari.*

It is, this 16th day of February, A. D. 1900, stipulated by and between the attorneys of record for the parties in the above-entitled cause that the certified transcript of the record of said cause, heretofore submitted to the Supreme Court of the United States with the petition for a writ of certiorari, may be filed in the said Supreme Court, and may be received and considered by that court as the

transcript of the record in said cause as though the same had been returned by the clerk of the circuit court of appeals for the ninth circuit in obedience to the writ of certiorari granted February 6, 1900.

STRUVE, ALLEN, HUGHES & McMICKEN, AND  
STRUDWICK & PETERS.

*Attorneys for Petitioner and Plaintiff in Error*

S. Warburton,

*Attorney for Respondent and Defendant in Error*

(Endorsed :) Stipulation as to return to writ of certiorari. Filed Feb. 20, 1900. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

United States Circuit Court of Appeals for the Ninth Circuit

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the next preceding page to be a full, true, and correct copy of a stipulation entered into between the respective counsel, filed in the cause entitled Mutual Life Insurance Company of New York, a corporation, plaintiff in error, *v.* George E. Hill *et al.*, defendants in error, No. 518, the original thereof remains of record in my office.

Attest my hand and the seal of

Seal United States Circuit Court of Appeals,  
Ninth Circuit.

United States circuit court of appeals  
the ninth circuit, at San Francisco, California, this 23d day of February, A. D. 1900.

F. D. MONCKTON, Clerk

[Ten-cent U. S. internal-revenue stamp, canceled Feb. 23, 1900. F. D. M.]

United States Circuit Court of Appeals for the Ninth Circuit

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Plaintiff in Error,	} No.
<i>v.</i>	
GEORGE E. HILL ET AL., Defendants in Error.	

*Return to Writ of Certiorari.*

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, in obedience to the foregoing writ of certiorari, issued out of the Supreme Court of the United States addressed to the honorable judges of the United States circuit court of appeals for the ninth circuit, commanding them to transmit the said Supreme Court the record and proceedings in the above entitled cause, do hereby attach to the said writ a certified copy of a stipulation entered into between the attorneys of record for

several parties in said cause on the 16th day of February, 1900, the original of which stipulation has been heretofore filed in this court, and do make the same my return to said writ.

Attest my hand and the seal of said  
Seal United States Cir- United States circuit court of appeals for  
cuit Court of Appeals, the ninth circuit, at San Francisco, Cali-  
Ninth Circuit. fornia, this 23d day of February, A. D.  
1900.

F. D. MONCKTON, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled Feb. 23, 1900. F. D. M.]

[Endorsed:] Case No. 17,567. Supreme Court U. S., October term, 1899. Term No., 453. The Mutual Life Ins. Co. of New York *vs.* George E. Hill *et al.* Writ of certiorari & return thereto. Office Supreme Court U. S. Filed Mar. 10, 1900. James H. McKenney, clerk.